IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

In the Matter of the Application for Post Conviction Relief of: DAVID HAEG, Applicant.	))))))	Case No. 3KN-10-1295 CI Criminal Case No. 4MC-04-24 CR

ORDER ON REVIEW OF DENIAL OF DISQUALIFICATION

I. INTRODUCTION AND PROCEDURAL HISTORY

David Haeg was charged in McGrath in 2004 with various fish and wildlife offenses. He was convicted at trial in 2005 on multiple counts, and his convictions were affirmed on direct appeal.[1]

Haeg then filed an application for post-conviction relief in the district court challenging his conviction and sentence on various grounds. The State moved to dismiss the application, arguing that it failed to state a *prima facie* case for relief. After extensive briefing, the then-assigned judge, Superior Court Judge Carl Bauman, sitting as a district court judge, summarily dismissed all but one of Haeg's claims, finding that they failed to state a *prima facie* case as to Haeg's conviction. However, Judge Bauman found that the pleadings established judicial bias as a matter of law as to Haeg's sentencing. As a result, Judge Bauman vacated Haeg's sentence and scheduled a new sentencing hearing.[2]

Both sides appealed this decision. The Court of Appeals reversed the district court's ruling, finding that it was error to rule on Haeg's claims of judicial bias without holding an

[1] *Haeg v. State*, 2008 WL 4181532 (Alaska App. 2008)(unpublished), rehearing denied September 26, 2008, *stay denied,* 556 U.S. 1124, *cert. denied*, 556 U.S. 1208, *reh. denied*, 557 U.S. 915 (2009).

[2] The original trial judge, District Court Judge Margaret Murphy, has now retired.

evidentiary hearing to resolve the disputed questions of material fact. The Court of Appeals remanded the case for further proceedings on those claims, and to rule on various other issues specified by the Court of Appeals.[3]

Because Judge Bauman had retired in the meantime, the case was ultimately reassigned on remand to Superior Court Judge William Morse, sitting as a district court judge. Judge Morse held an evidentiary hearing on January 28 and 29, 2019. The second witness called in that evidentiary hearing was Arthur Robinson. Mr. Robinson was the attorney for Haeg at his trial in 2005. One of the claims in Haeg's application for post-conviction relief was ineffective assistance of counsel by Mr. Robinson.

When Mr. Robinson took the witness stand, Judge Morse disclosed that he knew Mr. Robinson in 1981 and 1982 when the judge was a public defender in Kenai. Judge Morse said they knew each other because they were both criminal defense lawyers at that time. Judge Morse indicated that he did not think he ever went to Mr. Robinson's home, and did not socialize with him "other than maybe, I don't know, a beer after work maybe occasionally." Judge Morse described them as acquaintances.[4]

Judge Morse also disclosed that, in 1990, he worked for the Alaska Department of Law as an Assistant Attorney General, and he was assigned to give legal advice to the State of Alaska reapportionment board for a period of a little under a year. During that time, Mr. Robinson was one of the five members of the reapportionment board. Judge Morse traveled with the board to public meetings around the state, gave legal advice to the board, and made presentations to the public about the law at the beginning of the meetings. Before the board

[3] *Haeg v. State*, 2016 WL 7422687 (Alaska App. December 21, 2016)(unpublished).
[4] Transcript of January 28, 2019 evidentiary hearing at 169-170.

could actually do its "reapportionment census work," however, Governor Hickel replaced all the members of the reapportionment board and Judge Morse left the Department of Law.[5]

After Judge Morse made those disclosures, Haeg asked if he could disqualify Judge Morse. Judge Morse responded that Haeg could make that motion, if he wished. Haeg did move to disqualify Judge Morse, and Judge Morse denied the motion. Judge Morse did not, however, ask to have another judge assigned to review the denial pursuant to AS 22.20.020(c).

After the conclusion of the evidentiary hearing, Judge Morse issued a written decision denying Haeg's application for post-conviction relief. Haeg then appealed that decision to the Court of Appeals. One of Haeg's claims on appeal is that Judge Morse should have disqualified himself based on his prior relationship with Mr. Robinson.

AS 22.20.020(c) provides that a judge's decision denying disqualification "shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts. . . ." The review "may be ex parte and without notice to the parties or judge." There is some uncertainty in the case law about whether a litigant seeking disqualification bears the burden of requesting review by another judge.[6]

Given the lack of clarity in the case law and Haeg's *pro se* status, the Court of Appeals found that Haeg should be given an opportunity to have Judge Morse's denial of disqualification reviewed by another judge before the Court of Appeals considers Haeg's claims on appeal. As a result, the Court of Appeals on February 20, 2020, remanded this case

[5] Tr. 170-71.

[6] *Compare, Coffey v. State*, 585 P.2d 514, 525 (Alaska 1978), in which the Supreme Court said the party seeking disqualification waives the right to appeal on this issue if that party does not request a review, with *Kurka v. Kurka*, 2007 WL 1723468, at *6 (Alaska June 13, 2007)(unpublished), in which the Supreme Court suggested that it would be unfair to apply this rule to a *pro se* litigant.

to the Superior Court for the purpose of review of Judge Morse's denial of disqualification by a judge assigned by the Chief Judge of the Court of Appeals. On the same date, February 20, Chief Judge Allard assigned the undersigned, pursuant to AS 22.20.020(c), to review on an expedited basis Judge Morse's decision denying disqualification.

The undersigned was able to review the entire very voluminous file in this matter while in Anchorage on other business on February 27, 2020. Having conducted that review, the undersigned now issues the following order affirming Judge Morse's denial of the motion for disqualification.

II. APPLICABLE LAW

The role of this court is a very limited one. Review of a decision denying disqualification is not a substitute for appellate review. In other words, it is not this court's function to decide whether the decision made by Judge Morse denying Haeg's application was correct. Rather, this court's task is limited to deciding whether Judge Morse erred in denying the request for disqualification.[7]

Alaska Statute 22.20.020(a) provides as follows:

A judicial officer may not act in a matter in which

(1) the judicial officer is a party;

(2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;

(3) the judicial officer is a material witness;

[7] The motion for disqualification was denied on the record on January 28, 2019. Although this review is being conducted over a year later, the undersigned is attempting in conducting this review to do so precisely as it would have been reviewed if this review had been done at that time.

(4) the judicial officer or the spouse of a judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;

(5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;

(6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;

(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;

(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

Canon 2A of the Alaska Code of Judicial Conduct provides as follows:

In all activities, a judge shall exhibit respect for the rule of law, comply with the law, avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary.

Canon 3E of the Alaska Code of Judicial Conduct provides, in part, as follows:

(1) Unless all grounds for disqualification are waived . . . a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The decision of a trial judge not to recuse himself or herself is reviewed under an abuse of discretion standard. The decision will be reversed only when it is evident that no fair-minded person could have come to the same conclusion as the trial court on the basis of the facts in the

record.[8] The Alaska Supreme Court stated in *Rodvik v. Rodvik* that "[a] judge's conclusion that he or she can decide the case fairly will constitute an abuse of discretion only when it is plain that a fair-minded person could not rationally come to that conclusion on the basis of the known facts."[9] A judge's denial of a motion for disqualification will be reversed only when it is "patently unreasonable."[10]

The fact that a judge has ruled against a party does not, in and of itself, establish that the judge is biased against that party. "Mere evidence that a judge has exercised his judicial discretion in a particular way is not sufficient to require disqualification."[11] [E]ven incorrect rulings against a party do not show bias in and of themselves."[12] "Disqualification was never intended to enable a discontented litigant to oust a judge because of adverse rulings made."[13]

The grounds for disqualification set out in AS 22.20.020 do not include any specific reference to an appearance of impropriety. Appearance of impropriety is addressed only in the Code of Judicial Conduct, as referenced above. There is some uncertainty as to whether a judge assigned under AS 22.20.020 to review another judge's denial of disqualification may consider possible appearance of impropriety. The Court of Appeals noted in *Phillips v. State* that there are conflicting decisions of the Alaska Supreme Court on this point.[14] As the Court of Appeals did in

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[8] *Neal & Co. v. Dillingham*, 923 P.2d 89, 95 n. 7 (Alaska 1996) (*citing Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979) and *Alaska Trans. Corp. v. Alaska Elec. Light & Power*, 743 P.2d 350, 353 (Alaska 1987)).
[9] 151 P.3d 338, 352 (Alaska 2006) (internal quotation and footnote omitted).
[10] *Long v. Long*, 156 (Alaska 1991).
[11] *State v. City of Anchorage*,816 P.2d 145, 513 P.2d 1104, 1112 (Alaska 1973), *overruled on other grounds by State v. Alex*, 646 P.2d 203, 208 n. 4 (Alaska 1982).
[12] *Greenway v. Heathcott*, 294 P.3d 1056, 1063 (Alaska 2013).
[13] *Wasserman v. Bartholomew*, 38 P.3d 1162, 1171 (Alaska 2002) (footnote and internal quotation marks omitted).
[14] 271 P.3d 457, 463-67 (Alaska App. 2012).

Phillips, I will assume that the review should consider not only claims of actual bias, but also possible appearance of impropriety.[15] The Court of Appeals indicated in *Phillips v. State* that its review of judicial disqualification is done under an abuse of discretion standard as to whether there is any actual impropriety, but a *de novo* standard as to appearance of impropriety.[16]

III. DISCUSSION

The disclosures by Judge Morse at the evidentiary hearing on January 28, 2019 fell into two categories. The first was that the judge and Mr. Robinson were acquaintances when they both practiced criminal defense in Kenai in 1981 and 1982. And the second had to do with the judge's work as an Assistant Attorney General representing the reapportionment board of which Mr. Robinson was a member during 1990.

As to the first category, Judge Morse made the following disclosure:

> Mr. Haeg, let me make a disclosure. In, I think, '81 and '82, I lived in Kenai as -- and worked as a public defender. Mr. Robinson was an attorney back then there. And I don't know if I ever worked on a case with him with a codefendant or anything like that. But, you know, he was a criminal defense lawyer. I was a criminal defense lawyer. We knew each other. I never -- I don't think I ever went to his home. I didn't socialize with him other than maybe, I don't know, a beer after work maybe occasionally, but -- you know. We were acquaintances.[17]

The Court of Appeals discussed similar questions of social relationships in *Phillips,* in which the judge assigned to a criminal case knew the sister of the victim. The judge and the victim's sister lived in the same neighborhood, the sister was friends with the judge's wife and spoke with her frequently, the judge's children played with the sister's children, and the judge and

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[15] *Id.* at 466-67.
[16] *Id.* at 459.
[17] Transcript of January 28, 2019 Evidentiary Hearing at 169-170.

his wife had, on occasion, entrusted their children to the care of the sister's child. The judge himself, however, had had only limited contact with the victim's sister.

The Court of Appeals affirmed the judge's denial of disqualification, finding that this relationship established neither actual bias nor an appearance of impropriety. The Court noted that "there are many levels or degrees of friendship in our society."[18] When the issue is whether a judge's acquaintance or friendship with a person involved in a case requires disqualification,

> . . . the answer must ultimately turn on the specific facts of the case—in particular, the precise nature of the judge's relationship with that person, and the way in which that person is connected to the litigation.[19]

As the lawyer who represented Haeg at trial, and whom Haeg is now contending was ineffective, there is no question that Mr. Robinson is an important figure in this litigation. The nature of the relationship, however, is disputed.

Haeg has characterized Mr. Robinson and Judge Morse as "friends" and "drinking buddies."[20] He alleged that they "go out drinking beer together" (present tense).[21] Haeg alleged that the fact of their "private friendship" is established by the fact that they joked, on the record, "about a sports rivalry they have."[22]

Judge Morse, by contrast, described Mr. Robinson and himself as "acquaintances" as a result of their both having practiced criminal defense law in Kenai some 37 or 38 years earlier.[23] He did not say they were "drinking buddies;" rather, he said that during the time they were both

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[18] 271 P.3d at 469.
[19] *Id.*
[20] Haeg's "Emergency Motion to Strike Fraudulent Order," filed in the Court of Appeals on February 24, 2020, at 2.
[21] *Id.*
[22] *Id.* at 5.
[23] Hearing Transcript at 170.

practicing criminal law in Kenai in 1981 and 1982 they did not socialize "other than maybe, I don't know, a beer after work maybe occasionally."[24]

If these facts make Judge Morse and Mr. Robinson "friends," it would be an extraordinary slight level of friendship. The court views "acquaintances" as a better description of this relationship. This is a relationship far, far less substantial than the one found not to require disqualification in *Phillips*. There is no basis for the suggestion that there is an ongoing friendship, or that they are "drinking buddies."

It is the nature of doing business in Alaska that people know each other. Alaska is huge in geography but small in population. People who work in the same field, whether that is law or logging, tend to know each other. Most judges and lawyers in Alaska have practiced, over the course of their careers, in a variety of locations. Few practitioners who have been around as long as Mr. Robinson and Judge Morse have not crossed paths at some point.[25] The fact that Judge Morse and Mr. Robinson briefly practiced in the same locale 37 or 38 years before the 2019 evidentiary hearing is neither surprising nor concerning. And the fact that, during that time, as young men they might have occasionally had a beer together after work is also neither surprising or concerning. These facts do not make them "friends," they make them "acquaintances," which is the word Judge Morse used for their relationship.

If every judge took the time to disclose every insignificant acquaintance that judge has with each of the people who appears before them, the volume of such disclosures would leave

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[24] *Id.*

[25] The court takes judicial notice of the fact that Judge Morse was admitted to practice law in Alaska in 1981. Mr. Robinson was admitted to practice law in Alaska in 1974. These dates are derived from the first two digits of each practitioner's Alaska Bar Association membership number, found on the Alaska Bar Association member directory, https://alaskabar.org/member-services/member-directories/ (viewed March 3, 2020).

little time for court business, especially in smaller communities. It seems clear that Judge Morse disclosed his slight acquaintanceship with Mr. Robinson out of an abundance of caution.[26] In the view of the undersigned, this establishes neither bias nor an appearance of impropriety.

It is true, as Haeg noted, that they shared a sports reference. After Mr. Robinson concluded his testimony, the following exchange occurred:

> THE COURT: Mr. Robinson, you're excused.
>
> (Witness excused)
>
> THE WITNESS: Thank you, Your Honor.
>
> THE COURT: Have a safe journey back to the Peninsula.
>
> THE WITNESS: I sure will.
>
> MR. HAEG: Can I go grab my next witness?
>
> THE WITNESS: My Warriors won last night even though I missed the game.
>
> THE COURT: Don't rub it in.[27]

This was apparently a reference to the Golden State Warriors of the National Basketball Association.[28] The context for the statement is that Mr. Robinson's testimony carried over from January 28 to the next day, requiring him to stay over. It is not clear from the transcript what Judge Morse's response "don't rub it in" meant. It could have meant that Judge Morse is also a

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[26] A formal ethics opinion of the American Bar Association concludes that a judge need not disclose "his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding," though a judge may disclose the acquaintanceship if the judge so chooses. *See,* ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion Number 488, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_488.pdf.

[27] Tr. at 375-76.

[28] The court takes judicial notice of the fact that, on January 28, 2019, the Golden State Warriors defeated the Indiana Pacers 132 to 100, learned from a Google search for "January 28, 2019 NBA basketball schedule."

Warriors fan, meaning don't rub in the fact that he also missed the game. Or it could have meant that Judge Morse is not a fan of the Warriors, meaning don't rub in the fact that the Warriors won. But in either case, this is the kind of casual sports reference that is common in American life between friends, acquaintances, or between people who don't know each other at all. People regularly make this kind of sports reference with their cab drivers, with clerks in a store, or with strangers in almost any setting, even a courtroom. People to whom such a casual reference is made are likely to respond in kind, even to a stranger. No reasonable person would conclude that this established the existence of a close friendship between Judge Morse and Mr. Robinson.

The second issue disclosed by Judge Morse prior to Mr. Robinson's testimony was that Judge Morse, as an Assistant Attorney General for a period of less than a year in 1990, acted as legal advisor to the reapportionment board of which Mr. Robinson was a member. Arguably, this established an attorney-client relationship of sorts between Mr. Robinson and Judge Morse at that time.

AS 22.20.020(a) establishes a two year period prior to assignment of a case to a judge during which disqualification is required if a judge represented or professionally counseled a party to a case. Although technically this statute may not apply because Mr. Robinson is not a party to this case, the court will assume that recusal would have been appropriate if Judge Morse had been Mr. Robinson's attorney during that two year period.[29] Here, though, the prior professional relationship was 29 years before Mr. Robinson testified, and 27 years before the case

[29] Even if Judge Morse was not, technically, Mr. Robinson's attorney, it appears that he "professionally counselled" the reapportionment board of which Mr. Robinson was a member.

was reassigned to Judge Morse.[30] It was also some 15 years before Mr. Robinson represented Haeg at trial in this case.

I cannot conclude that this brief professional relationship in the far distant past required Judge Morse to disqualify himself. As with their acquaintanceship from Kenai 37 years before the hearing, it appears that Judge Morse disclosed this professional relationship out of an abundance of caution. This slight relationship neither established bias nor would any reasonable person conclude that it gave rise to an appearance of impropriety.

IV. CONCLUSION

The facts before the court do not establish any bias on the part of Judge Morse, nor do the facts show that any reasonable person would conclude that there was an appearance of impropriety. Given that, I cannot find that Judge Morse abused his discretion in denying the motion for disqualification. As a result, that decision is affirmed.

Entered at Juneau, Alaska this 4th day of March, 2020.

Philip M. Pallenberg
Superior Court Judge

[30] It appears that this case was first assigned to Judge Morse on May 17, 2017.